GANESAN G SUPPIAH *a*

v.

MOUNT PLEASURE CORP SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL KADIR SULAIMAN J
[ORIGINATING MOTION NO: R1-25-167-95]
8 NOVEMBER 1997

LABOUR LAW: *Employment - Termination - Employment Act 1955, ss. 13(2) & 14(1) - Domestic inquiry not held - Whether termination a nullity - Whether curable by hearing before Industrial Court* *c*

The applicant was in the employ of the respondent and was drawing a salary of RM205 per month. By way of a letter, the respondent terminated his employment in accordance with s. 13(2) of the Employment Act 1955 ('the 1955 Act') without holding any inquiry on the ground that he was found absent from work for the past six days. *d*

The applicant then made a representation under s. 20(1) of the Industrial Relations Act 1967 ('the 1967 Act') for reinstatement on the ground that his dismissal was without just cause or excuse. The Minister then referred the said representation to the Industrial Court for an award. *e*

The Industrial Court held that the applicant was dismissed by the respondent with just cause or excuse. The applicant then applied to the High Court for an order of *certiorari* to quash the award of the Industrial Court and for an order of mandamus directing another division of the Industrial Court to rehear his representations. *f*

The issues before the court was whether due inquiry under s. 14 of the 1955 Act is mandatory in every case of a dismissal of an employee under the 1955 Act, and the consequences of a failure to hold such an inquiry. *g*

Held:

[1] The dicta of Edgar Joseph Jr FCJ in *Said Dharmalingham Abdullah v. Malayan Breweries (Malaya) Sdn Bhd* was obiter in that the matter before the Supreme Court was not one under s. 20 of the 1967 Act, but was one concerning a declaration by way of a writ of summons in the High Court based on the provisions in the 1955 Act. Instead the cases in point are *Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Anor, Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* and *Milan Auto Sdn Bhd v. Wong Seh Yen.* *h* *i*

[2] Following the cases of *Dreamland Corp* and *Wong Yuen Hock*, if an employer has failed to make an inquiry before dismissing or discharging an employee, such failure is not fatal to the employer and he will be entitled to justify it before the Industrial Tribunal. This failure on the part of the employer should not deprive the Industrial Court of jurisdiction nor excuse it from the obligation to hear the reference on its merits. Once a case of wrongful dismissal has been properly referred by the Minister under s. 20(3) of the 1967 Act, the Industrial Court is seised with jurisdiction and is obliged under the 1967 Act to determine the dispute on its merits, firstly, whether the misconduct complained of was in fact committed by the employee, and secondly, whether the nature and extent of the misconduct could constitute just cause or excuse for the dismissal.

[3] The hearing before the Industrial Court itself which provides a better and impartial forum for the employee than most domestic tribunals, should be taken as sufficient opportunity for the employee to be heard to satisfy natural justice and thereby rectify any omission to hold any domestic inquiry. The Minister's reference should be viewed as a hearing *de novo* by an independent statutory tribunal.

[4] In the present case the Industrial Court had, based on the principles enunciated in *Dreamland* and *Wong Yuen Hock* exercised its jurisdiction to hear the representations of the applicant upon reference by the Minister to it pursuant to s. 20(3) of the 1967 Act. It had not fallen into error but had instead proceeded to hear the merits of the dispute to determine whether the dismissal of the applicant was with just cause or excuse.

[5] The initial defect in natural justice in not holding a statutory or contractual domestic inquiry was curable by the inquiry held by the Industrial Court itself. The requirement of due enquiry before dismissal by s. 14(1) of the 1955 Act for employees whose earning do not exceed RM1,250 per month cannot by mere inference change the policy of the law in s. 20 of the 1967 Act. The Industrial Court should not shy away or excuse itself from determining the two issues required to be determined in dismissal cases under s. 20 reference.

[Application dismissed.]

Cases referred to:

A-G Malaysia v. Chemical Workers' Union of Malaya & Anor [1991] 1 MLJ 38 ***(cit)***
Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Anor [1968] 1 MLJ 111 ***(refd)***
Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129 ***(refd)***
Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 ***(refd)***
Said Dharmalingham Abdullah v. Malayan Breweries (Malaya) Sdn Bhd [1997] 1 MLJ 352 ***(refd)***

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 ***(refd)***

Workmen of the Motipur Sugar Factory Private Ltd v. The Motipur Sugar Factory Private Ltd AIR [1965] SC 1803 ***(refd)***

Legislation referred to:

Employment Act 1955, ss. 13(2), 14(1), 15(2)

Industrial Relations Act 1967, ss. 20(1), (3)

For the applicant - Shamini Manikam; M/s Lobo & Assoc

For the respondent - Selvamalar Alagaratnam; M/s Gengla Maha Wong & Co

JUDGMENT

Abdul Kadir Sulaiman J:

The applicant applies for an order of *certiorari* to quash the Industrial Court Award No. 450 of 1995 which held that he was dismissed by the respondent with just cause or excuse. Consequentially, he applies for an order of mandamus directing another division of that Court to rehear his representations made under s. 20(1) of the Industrial Relations Act 1967 (hereinafter referred to as "the 1967 Act") in respect of the said dismissal resulting in the impugned Award. After hearing, on 8 October 1997 I dismissed his said application with costs. He appeals to the Court of Appeal against my said decision. I now provide the grounds for the decision I made.

The applicant was a steward in the employ of the respondent. His last drawn salary was RM205 per month. By a letter dated 11 November 1991 the respondent terminated his employment in accordance with s. 13(2) of the Employment Act 1955 (hereinafter referred to as "the 1955 Act") with effect from 5 November 1991 without holding any inquiry in that behalf on the ground that he was found absent from work since 5 November 1991. He considered himself as having been dismissed without just cause or excuse and consequently made representations under s. 20(1) of the 1967 Act for his reinstatement. Following a notification of the failure to settle the dispute, the Minister referred the said representations to the Industrial Court under s. 20(3) thereof for an award. According to his pleading before the Industrial Court, the applicant avers that his dismissal was contrary to the principles of natural justice and or an unfair labour practice.

Before the Industrial Court, the learned counsel for the applicant raised the issue of s. 14 of the 1955 Act wherein he as an employee under the said Act is entitled to be dismissed only after due inquiry. Section 14(1) of the 1955 Act states as follows:

14(1) An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of service, after due inquiry–

(a) dismiss without notice the employee;

(b) downgrade the employee; or

(c) impose any other lesser punishment as he deems just and fit.

It is not in dispute that in the case of the applicant, there was no inquiry being held pursuant to s. 14 of the 1955 Act before he was asked to leave the service of the respondent. At p. 8 of the impugned Award the learned Chairman of the Industrial Court, relying on *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Another Appeal* [1995] 3 CLJ 344, says this in arriving at his decision:

23. It is this court's view that the company need not invoke s. 14 of the Employment Act 1955. The company acted on s. 13(2) of the Employment Act. In fact that is what Harun J said in Award 55 of 1982. Section 13(2) provides:

> Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service.

24. The absence of a domestic inquiry is not a fatality and therefore the Industrial Court has the power to look into the merits of the case to determine whether the dismissal was with just cause and excuse.

On the evidence before him, the learned Chairman found that the dismissal was with just cause or excuse. Before me, the learned counsel for the Applicant submitted that due inquiry under s. 14 of the 1955 Act is mandatory in every case of a dismissal of an employee under the Act because the justification of the circumstance under s. 13(2) of the Act can only be ascertained after the due inquiry. In further support of her contention, the learned counsel relied very heavily on the Supreme Court decision in *Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan v. Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 MLJ 352. In that case, an "employee" under the 1955 Act being a person whose wages did not exceed RM1,250 a month was put before a domestic inquiry upon certain charges. After the inquiry, he was found guilty of all charges framed against him but without inviting the employee to make a plea in mitigation, the Panel recommended to the brewery manager that he be dismissed with immediate effect. Thereupon, the manager dismissed him with immediate effect. He issued a writ in the High Court seeking a declaration that his

dismissal was in breach of the rules of natural justice. The trial judge held that his employer had done all that was necessary to ensure a fair hearing at the inquiry and that there was no breach of the rules of natural justice. The employee appealed to the Supreme Court. On appeal, the main issue was whether a contractual servant who is an "employee" within the meaning of the 1955 Act was entitled to have his dismissal declared null and void if the procedural safeguards provided by law had not been observed at a pre-dismissal inquiry at the domestic level. Having considered the circumstances of the case, the Supreme Court dismissed his appeal holding that it would have been a useless formality to have accorded him the right to make a plea in mitigation as the penalty would have been the same even if that right had been exercised. However, of concern to the learned counsel for the applicant here is the dicta of Edgar Joseph Jr FCJ at p. 363 distinguishing *Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Anor* [1968] 1 MLJ 111 and *Wong Yuen Hock v. Sykt Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753, both being cases of references under s. 20(3) of the 1967 Act to the Industrial Court:

> Having said that, we must add that when, as here, a claimant is an employee within the meaning of the Act, he has – by s. 14(1) thereof – a statutory right to 'due enquiry' by his employer, and so, the approach of the Industrial Court – or, for that matter, the High Court – in considering the question whether the claimant had been dismissed without just cause or excuse would be to examine the decision not just for substance but for process as well.
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> It is not for this court to speculate what reasons of policy lay behind the decision of Parliament to impose monetary limits as regards salary of a workman to qualify for the right of 'due enquiry' under s. 14(1). An obvious consequence of monetary limits would be to give to the poorer and more deserving categories of workmen in receipt of incomes of less than RM1,250 per month a statutory safeguard against arbitrary dismissal.

The Supreme Court distinguished *Dreamland* and *Wong Yuen Hock*, for the reason that the workmen there were not "employee" under the 1955 Act and therefore, the provisions of s. 14 thereof is not applicable to them. The learned counsel for the applicant urged this court therefore, to consider the fact that in this present case, the applicant, being an "employee", but no inquiry under s. 14(1) of the 1955 Act was carried out before he was dismissed by the respondent.

In answer to that, my view is that the above-quoted dicta in *Said Dharmalingam* is obiter in that the matter before the Supreme Court was not one under s. 20 of the 1967 Act, as the present case is, but one concerning a declaration by way of a writ of summons in the High Court based on the provisions in the 1955 Act. As stated earlier, the issue in *Said Dharmalingam* was whether a contractual servant who is an "employee" within the meaning

of the 1955 Act was entitled to have his dismissal declared null and void if the procedural safeguards provided by law had not been observed at a pre-dismissal enquiry at the domestic level. Whereas in *Dreamland*, the court was considering the case of a workman under the 1967 Act who was in receipt of an income of more than RM1,250 per month and therefore, not an employee within the meaning of the 1955 Act. At p. 363 in *Said Dharmalingam*, his Lordship said:

> It follows that *Dreamland* was a case where it was not open to the workman to rely on a statutory or other requirement which provided or could be interpreted as providing the elementary safeguard of the right to a hearing. *Dreamland* is, therefore, readily distinguishable on the facts from the present case.

As for *Wong Yuen Hock*, his Lordship on the same page said:

> Similarly, the Supreme Court decision in *Wong Yuen Hock v. Sykt Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753 – which endorsed *Dreamland* – also concerned an employee in receipt of an income of more than RM1,250 per month and therefore, not an employee within the meaning of the Act. It was thus not open to him to rely upon the statutory right to a pre-dismissal hearing. Hong Leong is, therefore, also readily distinguishable on the facts from the present case.

But the case of the applicant is not one for a declaration but one in relation to a dispute under s. 20 of the 1967 Act. The cases in point are *Dreamland*, *Wong Yuen Hock*, and being added to the list is *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449. In *Dreamland*, the Supreme Court cited with approval a passage from *Workmen of the Motipur Sugar Factory Private Limited v. The Motipur Sugar Factory Private Limite*d AIR [1965] SC 1803 as being in accord with our 1967 Act. At p. 114, Wan Suleiman SCJ said:

> India, we were told, has statutory provisions similar to those in our Act. The following passage from a Supreme Court decision in *Workmen of the Motipur Sugar Factory Private Limited v. The Motipur Sugar Factory Private Limited* is relevant:
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> > Where an employer has failed to make an inquiry before dismissing or discharging a workman it is open to him to justify his action before the Tribunal by leading all relevant evidence before it. The entire matter would be open before the Tribunal. It will have jurisdiction not only to go into the limited questions open to a tribunal where domestic inquiry has been properly held, but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. The important effect of omission to hold an enquiry is merely that the Tribunal would not have to consider only whether there was a

> *prima facie* case but would decide for itself on the evidence adduced whether the charges have really been made out.
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> In India, it seems the failure is not fatal to the employer and he would be entitled to justify it before the Industrial Tribunal. If he had held the inquiry, he should have been told that they would not interfere unless they want the inquiry to be fair. If no inquiry had been held, the matter is at large.

In *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal* [1995] 2 MLJ 753, at p. 765 Mohd Azmi FCJ said:

> In our opinion, Dreamland did not belittle the importance of complying with any statutory or contractual enquiry before dismissal in all master and servant cases outside the purview of the Industrial Relations Act 1967. What Dreamland, following the curable principle in Motipur and Calvin laid down, was that failure on the part of the employer to hold a proper domestic inquiry should not deprive the Industrial Court of jurisdiction nor excuse it from the obligation to hear the reference on its merits. We therefore could not find any reason to reject the two authorities. In any event, we held the view that once a case of wrongful dismissal had been properly referred by the Minister under s. 20(3), the Industrial Court was seised with jurisdiction and was obliged under the Act to determine the dispute on its merits. Thus, even where there was a breach of contractual or statutory obligation to hold an inquiry, the Industrial Could should proceed to determine on the merits first, whether the misconduct complained of was in fact committed by the employee, and secondly, whether the nature and extent of the misconduct could constitute just cause or excuse for the dismissal.
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> Invariably, the hearing before the Industrial Court itself which indeed provides a better and impartial forum for the employee than most domestic tribunals, should be taken as sufficient opportunity for the employee to be heard to satisfy natural justice and thereby rectify any omission to hold any domestic inquiry. Indeed, the Minister's reference should be viewed as a hearing de novo by an independent statutory tribunal. In our view, this was a far cry from saying that a statutory or contractual requirement for a pre-dismissal inquiry could be totally ignored in all disputes involving master and servant, even though outside the parameter of s. 20. In the circumstances, we failed to understand the complaint of the Industrial Court that for it to inquire into the merits the question of 'just cause or excuse' would be 'grossly unfair'. Carrying out one's function could not possibly be described as an unfair exercise.

In the present case, the applicant complained that the learned Chairman of the Industrial Court in handing down the impugned Award had erred in law and acted in excess of the jurisdiction for doing just what the Federal Court in *Wong Yuen Hock* had approved. So, I cannot see in what way this court of judicial review can accept the contention of the applicant. The applicant

also contends that the Industrial Court here had asked itself the wrong question when that question was not remitted to it for determination when it held that the absence of a domestic inquiry under s. 14 of the 1955 Act is not fatal and therefore the Industrial Court has the power to look into the merits of the case to determine whether the dismissal of the applicant was with just cause or excuse. I see no merit in the contention in the light of the principle enunciated in *Wong Yuen Hock*. The Industrial Court exercised the jurisdiction to hear the representations of the applicant upon its reference by the Minister to it pursuant to s. 20(3) of the 1967 Act. Once the case is referred to it, the Industrial Court is seised with power to hear the dispute and make its award: See *A-G, Malaysia v. Chemical Workers' Union of Malaya & Anor* [1991] 1 MLJ 38. In *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 2 MLJ 129, Raja Azlan Shah CJ (Malaya) (as he then was) speaking for the Federal Court held at p. 136:

> We do not see any material difference between a termination of the contract of employment by the notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

In this case, the reason given by the respondent was that the applicant had contravened s. 13(2) of the 1955 Act for being absent without leave for more than two consecutive working days without prior leave which by s. 15(2) the applicant is deemed to have broken his contract of service with the respondent which entitles the respondent to act under s. 13(2) to terminate his service. Therefore, for the reason given by the respondent, the duty of the Industrial Court in this case is to enquire whether that excuse or reason has or has not been made out. That was what exactly the learned Chairman in this case did and found by his Award that the dismissal of the applicant was with just cause or excuse. The Industrial Court here did not in any way misconstrue or misapply the ratio in *Wong Yuen Hock* as so contended by the applicant.

In *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449, the workman, a mechanic with a monthly salary of RM600 was dismissed by his employer. Though an employee under the 1955 Act, his employer did not hold any inquiry under s. 14 of the said Act. He considered himself as having been dismissed without just cause or excuse and made representations under s. 20(1)

of the 1967 Act. His representations was referred by the Minister to the Industrial Court under s. 20(3) of the said Act. Before the Industrial Court, the employer gave the reason for the dismissal of the workman based upon his misconduct. In the award, the Industrial Court merely took note of the alleged grounds for the dismissal but did not make any decision on the merits considering it to be unnecessary. The court was of the view that it was sufficient to dispose off the dispute purely on account of the employer's failure to comply not only with the principle of natural justice but also with the statutory requirement of 'due inquiry' before dismissal under s. 14 of the 1955 Act. The Industrial Court formed the view that the principle in *Workmen of the Motipur Sugar Factory Private Limited v. The Motipur Sugar Factory Private Limited, supra,* and followed by *Dreamland* is not applicable in the light of the express provisions of s. 14 of the 1955 Act. Hence the dismissal of the workman was without just cause or excuse for the purpose of s. 20 of the 1967 Act. The employer applied to the High Court for *certiorari* to quash the said award of the Industrial Court. The High Court dismissed the application of the employer and an appeal was filed with the Federal Court. The Federal Court allowed the employer's appeal. Mohd Azmi FCJ at p. 454 said:

> In the context of s. 20 reference, we disagreed with the above argument. For one thing, Surinder Singh Kanda is not a dispute under the Industrial Relations Act, and for another the case of *Syarikat Great Eastern Life Assurance Bhd.* is not a binding authority. As pointed out by this Court recently in *Hong Leong Assurance Sdn. Bhd. v. Wong Yuen Hock* [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under s. 20 is two-fold firstly, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error which would merit interference by *certiorari* by the High Court. Further, the Industrial Court would be acting in excess of jurisdiction if it changed the scope of the reference by substituting its own reason, that is to say a reason not relied upon by the employer for the dismissal. For the reasons given in Hong Leong Assurance, we were of the view that the initial defect in natural justice in not holding a statutory or contractual domestic inquiry was 'curable' by the inquiry held by the Industrial Court itself on the principle laid down in *Workmen of the Motipur Factory Private Ltd. v. The Motipur Sugar Factory Private Ltd.* AIR [1965] SC 1803; *Calvin v. Carr & Others* [1979] 2 All ER and *Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Anor.* [1988] 1 MLJ 111.

Then his Lordship continued:

> As pointed out in *Hong Leong Assurance* case, the requirement of due enquiry before dismissal by s. 14(1) of the Employment Act for employees whose earning did not exceed one thousand two hundred and fifty ringgit per month

a could not by mere inference change the policy of the law in s. 20 of the Industrial Relations Act. Further, there would be no basis in law for holding that the defect in natural justice could only be cured, if the workman earned more than RM1,250 per month. As such, we could not accept that the principle of curability should be limited only to certain category of workmen depending on their salary. In the absence of clear words by Parliament, we held the view b that none of the Amending Acts to the Employment Act 1955 viz Act A 91/ 1971, Act A 360/1976, and Act A 497/1980, was intended to alter the policy of the law under the Industrial Relations Act 1967. The Industrial Court should not therefore shy away or excuse itself from determining the two issues required to be determined in dismissal cases under s. 20 reference. In our view, the c Industrial Court had in the present appeal committed jurisdictional error in omitting to carry out its basic functions.

So, in the present case, the Industrial Court properly guided by *Wong Yuen Hock* has not fallen into error in proceeding to hear the merits of the dispute to determine whether the dismissal of the applicant was with just cause or d excuse. If it had acted based on the contention of the applicant, it would have fallen into the same error as the Court in *Milan Auto Sdn Bhd, supra.*

Even though various other grounds were put up by the applicant in support of the application for *certiorari* and mandamus, the submissions of the learned counsel for the applicant centres around the issue of the failure of the e respondent to hold an inquiry under s. 14 of the 1955 Act before dismissing the applicant. For the reasons stated above and on the authorities binding on this court, I had no alternative but to dismiss the said application of the applicant.

f *Reported by Ling Hea Hoon*

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